United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
Jerome J. Niedermeier

Docket No. **76-2174**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CALVIN L. TRUDO

Petitioner-Appellant

v.

UNITED STATES PAROLE BOARD

Appellee

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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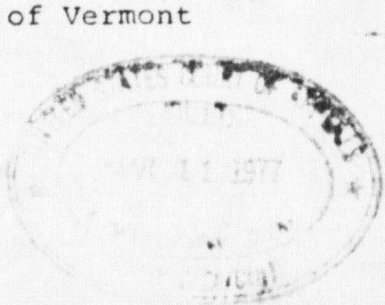

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BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Calvin L. Trudo appeals from an order of the United States District Court for the District of Vermont, the Honorable Albert W. Coffrin, United States District Judge, denying Trudo's petition for a writ of habeas corpus. (Doc. 20; GA 33)*

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* GA refers to Government's Appendix;
PB refers to Petitioner's Brief;
Doc. refers to the Document number in the record.

Calvin L. Trudo filed a petition for a writ of habeas corpus (28 U.S.C. § 2241) in the United States District Court for the District of Vermont on March 29, 1976. (Doc. 1) Trudo sought release from federal custody because the Parole Board did not hold his parole revocation hearing until after he had served an intervening federal sentence.

On October 15, 1976, the Government filed a motion to dismiss for lack of jurisdiction. (Doc. 17; GA 30) The Court filed an order and opinion on November 8, 1976 denying the Government's motion to dismiss and also denying Trudo's petition for a writ of habeas corpus. (Doc. 20; GA 32)

STATEMENT OF FACTS

On December 11, 1970 Trudo was sentenced in the District Court for the District of Vermont to eighteen years imprisonment under the Federal Bank Robbery statute, 18 U.S.C. 2113(d) - assaulting a person with a dangerous weapon in the commission of a bank robbery. (Doc. 20; GA 32) On September 27, 1974 Trudo was released on parole and, two months later, on November 26, 1974, he was arrested for a violation of 18 U.S.C. § 1202 - possession of firearms by a convicted felon. (Doc. 20; GA 32) On January 26, 1975, Trudo pleaded guilty to the above charge and on March 7, 1975 was sentenced to eighteen months imprisonment pursuant to the provisions of 18 U.S.C. § 4208(a)(2).* (Doc. 7; GA 4)

On February 10, 1975 after Trudo had entered his plea of guilty to the gun charge, a parole violation warrant was issued. (Doc. 7; GA 4) In the spring of 1975** Trudo's alleged mitigation witness, Willard Rock, died. The warrant was lodged as a detainer against Trudo on July 10, 1975. (Doc. 7; GA 4)

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* This provision (now 18 U.S.C. § 4205(a)(2)) allows the court to fix a maximum period of imprisonment with eligibility for parole in the discretion of the Parole Commission.

** May 9, 1975

On January 28, 1976 Trudo was given a preliminary hearing on the detainer at Lewisburg at which time he admitted the three charges* against him and waived the right to counsel. When Trudo's eighteen month term expired on January 30, 1976, the parole violator's warrant was automatically executed. (Doc. 7; GA 4) However, on February 12, 1976 at a second hearing Trudo contested the charges pending advice of counsel.** On February 12 Trudo also asked for counsel to be appointed.

On April 5, 1976, Trudo, represented by counsel, was given a parole revocation hearing. At that hearing he admitted all three charges against him. (Doc. 7; GA 5-6; Doc. 15; GA 13-14)

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* 1) Possession of firearms transported [in] interstate commerce - for which Trudo was serving the eighteen months.
2) Unauthorized possession of firearms.
3) Possession of stolen properity. (Sic)

(Doc. 7; GA 5-7)

** Trudo claims that he was not given a preliminary hearing in January - February, 1975. (PB 4) However, the summary of the actual revocation hearing (Doc. 1; GA 5) and the transcript of that hearing (Doc. 15; GA 10-11) clearly state that Trudo had two preliminary revocation hearings.

He presented to the hearing board a "petition in support of reparole" containing his reasons for parole. (Doc. 16; GA 27) The hearing board decided to revoke Trudo's parole based on his admission of the three charges against him. (Doc. 5; GA 8)

On March 29, 1976* Trudo filed his petition for writ of habeas corpus in the District Court for the District of Vermont. (Doc. 1)

On November 8, 1976, Judge Coffrin denied the Parole Board's motion to dismiss for lack of jurisdiction and also denied Trudo's petition. (Doc. 20; GA 32) Trudo appeals from that portion of the order denying his petition.

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* A week prior to his actual revocation hearing.

ARGUMENT

I

THE DISTRICT COURT LACKED JURISDICTION OVER THE RESPONDENT PAROLE BOARD.

Although the decision of the District Court was clearly correct on the merits, the Government contends that the Court lacked jurisdiction over the respondent Parole Board to decide the issue.

Trudo filed his petition for a writ of habeas corpus pursuant to 18 U.S.C. § 2241 on March 29, 1976, in the District Court for the District of Vermont, (Doc. 1) naming the United States Parole Board * as respondent. At that time Trudo was a resident at the Federal Penitentiary, Lewisburg, Pennsylvania. Since such a writ acts only on "the person who holds him in. . .custody," Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-5, 93 S. Ct. 1123, 1129 (1973), in order for the court to have jurisdiction over the writ, it must have jurisdiction over the petitioner's proper custodian.

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* The parole Commission is the Parole Board's successor under the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 et seq. (May 14, 1976). Since the facts below occurred under the Parole Board, the term "Board" rather than Commission will be used in this Brief.

This Court discussed this same jurisdictional issue in Billiteri v. United States Board of Parole, 541 F.2d 938 (2d Cir. 1976). Billiteri was an inmate at Lewisburg who had been indicted, convicted and sentenced in the Western District of New York. Billiteri at 946. After the Parole Board denied him parole, Billiteri attempted to attack the reasons for such denial by a petition for habeas corpus, naming the Board of Parole as respondent. This Court (Anderson, J.) held that "[I]n order to. . .entertain a habeas corpus action, [the court] must have jurisdiction over the petitioner's custodian." Billiteri at 948. The Court in finding that the warden, not the Parole Board, was Billiteri's proper custodian decided that the district court had no jurisdiction over the warden and dismissed the action. Id. The Court went on to note probable jurisdiction in the Middle District of Pennsylvania and stated:

> But it would stretch the meaning of the term beyond the limits thus far established by the Supreme Court to characterize the Parole Board as the "custodian" of a prisoner who is under the control of a warden and confined in a prison, and who is seeking, in a habeas corpus action, to be released from precisely that form of confinement. At that point the prisoner's relationship with the Parole Board is based solely on the fact that it is the decision-making body which may, in its discretion, authorize a prisoner's release on parole.

Billiteri at 948.

However, the district court below distinguished Trudo from Billiteri relying on the fact that Trudo was held in custody on a parole violator's warrant and not by reason of the denial of parole as in Billiteri's case. (Doc. 20; GA 33-34) Although this Court in Billiteri, at indicated that the Parole Board might "arguably" be considered the proper custodian when a parolee is being detained on a parole violator's warrant, the Court cited Lee v. United States, 501 F.2d 494, 501 (8th Cir. 1974) for this theory. However, Lee specifically held on this point that under these circumstances, i.e., custody pursuant to a detainer, jurisdiction over the custodian Parole Board was proper, if at all, only in Washington, D.C.:

> In this case, no custodian of petitioner is within the confines of the Eastern District of Arkansas. The warden of the United States Penitentiary in Terre Haute, Indiana, can be called petitioner's immediate custodian, and the Board of Parole, located in Washington, D.C., can be called another custodian due to its procedures in detaining petitioner. As of last notice to us, petitioner is still incarcerated in Terre Haute, Indiana. Therefore, neither the petitioner nor his custodian is located within the Eastern District of Arkansas. The District Court, therefore, lacks in personam jurisdiction in a federal habeas action to hear petitioner's claim.

Lee at 501.

The District Court below found jurisdiction over the Parole Board based on an erroneous interpretation of Shepard v. United States Board of Parole, 541 F.2d 322 (2d Cir. 1976), vacated and remanded, 45 U.S.L.W. 3488 (Sup. Ct. January 18, 1977). Even if the Parole Board were the proper respondent and custodian of Trudo, the Court had no jurisdiction over the Board to issue the writ. In Braden v. 30th Judicial Circuit Court, supra, the Court stated:

> So long as the custodian can be reached by service of process, the Court can issue a writ within its jurisdiction requiring that the prisoner be brought before the Court for a hearing on his claim, requiring that he be released outright from custody even if the prisoner himself is confined outside the Court's territorial jurisdiction.

410 U.S. at 495, 93 S. Ct. at 1130.

A court clearly must have jurisdiction over the custodian. The holding in Shepard, supra, relied upon by Judge Coffrin is not inopposite. Shepard, while incarcerated in New York on a state conviction had a detainer lodged against him in New York by the federal Parole Board. Shepard at 323. This Court found that the lodging of the detainer against Shepard in New York "satisfied § 2241 (c)(3)'s 'in custody' requirement" to give the district court jurisdiction over the Parole Board in New York. Id. However, in the instant case the detainer was lodged in Pennsylvania and Trudo was and is incarcerated in Pennsylvania. There is absolutely no custody

within the District of Vermont nor is there any presence of the Board within the jurisdiction of the District of Vermont. If the lodging of the detainer is sufficient under Shepard v. U.S. Parole Board, supra, to give the Court jurisdiction over the Board, then that jurisdiction lies in Pennsylvania where the detainer was lodged.*

The recent decision of this Court in Shelton v. Taylor, et al., ___ F.2d ___, Doc. No. 76-2099, slip op. 1893 (2d Cir. Feb. 22, 1977) (Lumbard, J.) supports the Government's position. In that case this Court found that the court for the Southern District of New York had jurisdiction over a petition for a writ of habeas corpus even though the detainer was lodged in New Jersey. However, the respondents named as custodians were the warden of the penitentiary in New York and the Parole Board. This Court stated:

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* Judge Coffrin apparently believed that once a detainer was lodged by the Parole Board, any district court had jurisdiction. (Doc. 20; GA 33-34) However, Shepard v. U.S. Parole Board, supra, found jurisdiction only in the district where the detainer was lodged. See Judge Friendly's concurring opinion in Kahane v. Carlson, 527 F.2d 492, 497 (2d Cir. 1975) in which he warns of "the spectacle of the warden of a large federal prison being answerable. . .to district judges scattered from Maine to Hawaii and Florida to Alaska. . ." At 497.

> When both the challenged custody and the custodian are within the same district, habeas corpus jurisdiction is clearly available there.

Shelton, supra, at 1897.

Since the respondent warden in Shelton was present within the district, the Court found jurisdiction. However, in the instant case neither Trudo nor his warden nor the Parole Board was ever present in the District of Vermont. There was and is absolutely no custody nor custodian within Vermont. There was therefore, no basis for the Court to have assumed jurisdiction. See Shelton, supra.

II

ASSUMING, ARGUENDO, THAT THE COURT HAD JURISDICTION OVER THE PAROLE BOARD, ITS DECISION DENYING TRUDO'S RELEASE FROM CUSTODY WAS NOT CLEARLY ERRONEOUS.

Last term the United States Supreme Court held (7-2) in Moody v. Daggett, 97 S. Ct. 274 (1976) that a federal parolee imprisoned for a crime committed while on parole is not constitutionally entitled to a prompt parole revocation hearing when a parole violation warrant is lodged as a detainer but not served on him; the Board may delay such a hearing until he is taken into custody as a parole violator by execution of the warrant. Moody supra, at 280. Although Trudo attempts to distinguish Moody to avoid its fatal holding, his efforts must fail.*

Trudo contends that he was improperly denied a parole

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* Although Moody was decided after both Shepard v. United States Board of Parole, supra (relied on by Judge Coffrin) and Judge Coffrin's decision below, both Judge Coffrin (Doc. 20; GA 34) and this Court (Shepard at 324) recognized that Moody would be dispositive of both cases.

revocation hearing during the time he was in custody on the intervening sentence. (PB 8.) However, as the Court said in Moody, supra:

> We hold that there is no requirement of an immediate hearing.

97 S. Ct. 278.

Trudo clearly then had no right to a parole revocation hearing during the time of his intervening sentence.

The circumstances in Moody and as alleged by Trudo are almost identical. Moody after being placed on federal parole was convicted of another federal crime. Moody at 275. The Parole Board placed a parole violation warrant as a detainer against Moody and denied Moody's request for an immediate revocation hearing. Id. The Board decided to await the completion of the intervening sentence before it executed the detainer. Moody at 276. Moody argued,* as Trudo does now, that by delaying his parole revocation hearing until the expiration of the intervening sentence, the Parole Board has barred him from concurrent sentences and risked the loss of mitigating evidence. Moody at 278.

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* Moody also argued that such a delay would retard his parole eligibility and affect his prison status, Moody at 278, arguments not advanced by Trudo. The Supreme Court clearly rejected those arguments. Moody at 279 and 279 n.9.

As the facts indicate, Trudo like Moody was convicted of another federal crime while on federal parole. (Doc. 7; GA 4) A parole violation warrant was lodged as a detainer and executed upon the completion of the intervening sentence. (Doc. 7; GA 4) A parole revocation hearing was then held on April 5, 1976* (Doc. 5; GA 8) and the Board decided to revoke his parole.

Although the Court rejected Moody's contention that he suffered a loss of a liberty interest, i.e., the possibility of concurrent sentences, from the denial of a prompt revocation hearing, (Moody, supra, at 279), Trudo seeks to re-argue this point before this Court. He claims that prior to the 1976 Act the Board had no power to grant concurrent sentences retroactively, see 18 U.S.C. §§ 4211, 4214(d); 28 C.F.R. § 2.21, 2.52(c)(2), and since the Board allegedly had no such power he was deprived of the possibility of concurrent sentences. (PB 23)

The Court in Moody in discussing the effect of the 1976 Act stated:

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* Trudo misstates the record when asserting that the revocation hearing date was April 4, 1975. (PB 16)

> The Act renamed the Board the Parole Commission and made other charges in federal parole procedures, principally to codify the Board's existing practices.

(Footnote omitted.) 97 S. Ct. 276.

The Court then proceeded to review the "few modifications" incorporated in the 1976 Act. Moody, supra, at 277. Nowhere does the Court state that the old Board lacked the power to grant concurrent sentences retroactively. Trudo's conclusion that the old Board had no such power cannot in any way be buttressed by Moody. To the contrary from the failure of the Court to single out that retroactive power a logical assumption can be made that the Act merely codified the existing power of the Board.*

However, even if the Board revoking Trudo's parole did not possess the power to grant concurrent sentences retroactively, Trudo's claim of prejudice is too speculative to justify relief.

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* Trudo's contention (PB 23) that by using the term "Commission" when speaking of retroactivity the Court recognized a new power is an unsupported assumption.

This Court in Shelton v. Taylor, et al., ___ F.2d ___, Doc. No. 76-2099, slip op. 1893 (2d Cir. Feb. 22, 1977) (Lumbard, J.) has recently considered and rejected this same issue raised by Trudo. Shelton argued that:

> . . .the Board of Parole was operating under the assumption that it did not have the power to grant retroactive credit to parole revokees for time served in state prison. . .[and] infer[red] that the post-ponement of his revocation hearing until the end of his state prison term [intervening sentence] did destroy his chances of having his federal sentence run concurrently with his state imprisonment.

Shelton v. Taylor, supra, at 1893.

This Court found that the regulation under which the old Board was operating could be read both ways, i.e., the Board possessed or did not possess the power to grant concurrent sentences retroactively. Shelton, supra, at 1899. This Court went on to say that, although the Board could have considered granting Shelton retroactive credit, in light of the Board's general policy against awarding such credit and its actual decision to revoke parole, the Board very likely did not consider concurrent sentences warranted. Shelton at 1899. This Court found this and all of Shelton's claims of prejudice not only insufficient to justify the granting of the writ but also "too speculative" to even justify ordering the Parole Board to consider retroactive credit for the intervening sentence.* Shelton at 1898.

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* In his brief Trudo implicitly admits the decision in Shelton should control his appeal also. (PB 11 footnotes.)

Trudo's identical claim must meet the same fate as Shelton's.

III

THE DISTRICT COURT CORRECTLY DECIDED THAT TRUDO SUFFERED NO PREJUDICE.

As evidenced by the thorough analysis of Judge Coffrin below, Trudo suffered no prejudice whatsoever in the procedures used by the Parole Board. Although Trudo claims that he was prejudiced by the failure of the Parole Board to inform him of the detainer until January, 1976, an analysis of the facts clearly shows the impossibility of prejudice from the death of Trudo's so-called witness in mitigation, Willard Rock.

Trudo contends that the parole violation warrant was lodged as a detainer against him at Lewisburg on July 10, 1975. (PB 3) According to the Board's own regulations, 28 C.F.R. § 2.53(a)(1975), Trudo was to be advised of the detainer after it was lodged. Trudo now contends that the failure of the Board to follow its regulations and inform him of the detainer after it was lodged prevented him from "present[ing] to the Board an affidavit or statement from Willard Rock. . .before Rock's death," (PB 14) and forced him "to report from his own mouth what Rock would have said and was able to do this only at the conclusion of the new term." (PB 14) Such alleged prejudice was an actual impossibility. Trudo admits that Rock

died in the spring of 1975* (Doc 16; GA 28) The Board's procedures, as Trudo concedes, did not require notice of the detainer until it was lodged on July 10, 1975. Trudo could not have presented any more evidence in mitigation in July 1975 than he did at his parole revocation hearing in April 1976 since on July 10, 1975 Rock had been dead for two months. Trudo clearly can show no actual prejudice at all from the alleged failure of the Parole Board to advise him in July - August, 1975, to present all relevant mitigating evidence.**

Even conceding that Trudo was unaware of the opportunity to present mitigating evidence to the Board when that evidence was available to him, that fact does not provide any reason why the District Court could not, as it did, after a review of all the evidence, rationally conclude

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* Actually May 9, 1975.

** Even if Trudo had been able to show prejudice from this failure, any prejudice from this alleged oversight was cured through his subsequent revocation hearing on April 5, 1976. Shelton v. Taylor, et al., supra at 1902, footnote.

that the assertedly "missing evidence" would not have added significantly to the evidence before the Board. Moreover, even conceding that Trudo might have presented strong evidence concerning his asserted attempt to reach the F.B.I., the altered degree of reliability in proving the asserted facts would not disturb Judge Coffrin's finding that the testimony "would not have added significantly to the evidence before the Board." (Doc. 20; GA 36) Trudo simply confuses the lost degree of evidentiary "reliability" with its ultimate "significance" in the decision to revoke parole. No reason is offered as to why Judge Coffrin "clearly erred" in thinking that the asserted attempts to phone the F.B.I. lacked significance in view of all the other circumstances and evidence before the Board, including the undeniable fact of conviction. Trudo is simply attempting to prove that his crime was excusable by reason of duress, which is an issue that should have been presented at his criminal trial, for it goes to the heart of the question of his guilt. As stated in Morrissey v. Brewer, 406 U.S. 471 (1972):

> Obviously, a parolee cannot relitigate issues determined against him in other forums, as in the situation presented where the revocation is based on conviction of another crime." (406 U.S. at 490).

Finally, the evidence in mitigation is very similar to that found "too minimal and speculative to warrant relief" by this Court in Shelton v. Taylor, et al, supra.

Trudo also concludes that the Board did not consider his evidence of mitigation since the revocation hearing summary did not mention it. However, the transcript of the hearing clearly indicates that Trudo was given the opportunity to present all evidence in mitigation including his written petition (Doc. 16) and the Board referred to that testimony in the hearing (GA 17-24). The Board based its revocation decision on Trudo's admission of the charges. The District Court had no power to substitute its discretion for that of the Board. Billiteri v. U.S. Board of Parole, 541 F.2d 938, 946 (2d Cir. 1976).

Finally, Trudo appears to allege prejudice from his contention that he was not afforded a preliminary hearing prior to the revocation hearing. Such assertions are contradicted by the facts. Although a person in Trudo's status (revocation based on conviction) has no right to a preliminary Morrissey-type hearing prior to revocation, Moody, supra, at 278, n.7, Trudo admitted that he had two such preliminary hearings (Doc. 15; GA 10-11) He can claim no prejudice at all.

CONCLUSION

The decision of the District Court should be reversed because of a lack of jurisdiction and the petition dismissed, or in the alternative, the decision of the District Court should be affirmed.

Respectfully submitted,

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March 9, 1977

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CALVIN L. TRUDO

v. Civil No. 76-2174

U.S. PAROLE BOARD

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of March , 1977, mailed two copies of the Appendix and Brief in the above-captioned action, to counsel for plaintiff, William J. Gallagher, Esq., Legal Aid Society, Federal Defender Services Unit, 509 U.S. Courthouse, Foley Square, New York, New York 10007, postage prepaid.

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